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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 449

ST. REGIS PAPER COMPANY,
Petitioner,

v.

GEORGE A. STUART,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioner, St. Regis Paper Company, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, affirming a judgment of the United States District Court for the District of Massachusetts entered on three special verdicts of a jury. The jurisdiction of the District Court rested upon the diversity of the citizenship of the parties. Each of the special verdicts was on a question of law involving the construction and validity of a written agreement.

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is reported at 214 F. 2d 759. A copy of the opinion of the Court of Appeals is appended hereto. The unreported opinion of the District Court appears in the joint appendix at page 254. The copy of that opinion is also appended.

Jurisdiction

Jurisdiction of this Court is invoked under 28 U.S.C. §1254. The judgment of the Court of Appeals was entered July 26, 1954. Petitioner duly petitioned the Court of Appeals to rehear the appeal in that Court and an order denying rehearing was entered August 18, 1954.

Questions Presented

The questions presented on this petition are:

1) In the trial of a civil action at law in a federal district court, where jurisdiction is founded upon diversity of citizenship of the parties, is it the responsibility of the trial judge or of the jury to construe a written commission agreement where there is no dispute as to the provisions of the agreement or any evidence of extrinsic facts relating thereto?

2) Was there a failure in the courts below to apply correctly the Massachusetts conflicts of law rule in accordance with the doctrine of *Erie R. Co.* v. *Tompkins,*

304 U. S. 64 and *Klaxon* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487?

3) Does federal law require the trial judge to direct a verdict for the defendant where all of the evidence and all reasonable inferences therefrom point to the conclusion that the agreement was abandoned by the parties?

4) Did the Court of Appeals err in affirming the judgment of the District Court in favor of respondent against petitioner?

The Statute

Rule 19(a) of the Federal Rules of Civil Procedure:

> "(A) *Necessary Joinder.* Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff."

Statement of the Case

This action was commenced by respondent Stuart in the Superior Court of Massachusetts. Petitioner removed the action to the United States District Court for the District of Massachusetts. In three separate causes of action, respondent claimed $82,797.28 as commission under

an agreement reproduced in the margin.[1]

---

[1] TAGGART BROTHERS COMPANY, INC.
60 East 42nd Street
New York

July 5th, 1935

Mr. A. B. Carey,
Mr. Geo. A. Stuart.

Gentlemen:-

This will confirm our conversation today—at which time you gentlemen agreed to sell Flour and Potato Bags on the following basis:

We to pay each of you salary of $175.00 per month. In addition—we are to pay an allowance of 6 cents per mile when cars are used for making sales; also traveling expenses in connection with sales—all of which (cars and traveling expenses) are estimated at approximately $2,000 per annum—per man.

In consideration of the above you estimate you will return to us sales of 5,000,000 Flour Bags and 2,500,000 Potato Bags—per annum. In the event such sales of Flour and Potato Bags are made, and delivered, it is agreed all sales of Flour and Potato Bags, in excess of the 7,500,000 referred to, added compensation, in the form of commission, will be allowed thereon—for such excess sales—at the following rates:—

⅛'s	$1.70M
1/16's	1.15 "
6's	.70 "
3's	.70 "
2's	.50 "
Potato Bags	$1.00M

It is agreed you will also be agreeable, in the course of your travels, to soliciting such Miscellaneous Bag sales as we may designate—it being understood no commissions shall be paid for, or on, such Miscellaneous sales.

It is further agreed your territory for above sales will embrace Pennsylvania, Delaware, Maryland and District of Columbia [in ink, New Jersey ATP]—and Maine only for Potato Bags. It is understood such Flour and Miscellaneous accounts as are now reserved for other salesmen—shall continue on present basis until otherwise changed.

With respect to Mr. George A. Stuart—it is understood this arrangement is to become effective Monday, January 8th, 1935.

It is agreed this arrangement is to be on a yearly basis—either of the signing parties reserving the right to cancel upon reasonable and sufficient basis with, in any event, not less than thirty days (30 days) notification.

Very truly yours,

TAGGART BROTHERS COMPANY INC.
(signed) A. T. PLUNKETT
Vice President

(signed) ALBERT B. CAREY
(signed) GEO. A. STUART

Prior to the trial petitioner[2] moved in the District Court to dismiss this action under Rules 12(b) and 19(a) of the Federal Rules of Civil Procedure for failure to join Mr. A. B. Carey as an indispensable party. The motion was denied without prejudice to renewal at the trial. The motion was renewed at the trial.

The commission part of the agreement was joint upon its face. It was addressed to two individuals Mr. A. B. Carey and respondent who are referred to as "you gentlemen". It was signed by Mr. Plunkett as vice-president of the employer. Only in regard to the salary and the expenses is there found language indicating that the arrangement was several. In the commission arrangement there was no language to indicate that the obligation was several.

As the Court of Appeals said in its opinion (at p. 31, *infra*):

> "There are no clear words of severability in the promise to pay commissions. * * * Nor is there any strong inference of severability with respect to the promise to pay commissions as there is with respect to the promise to pay expenses."

There was no provision fixing individual minimum quotas of either flour or potato bags for each of the two employees or for the division of commission between Carey and Stuart.

At the date of the agreement Stuart had had no prior experience whatever in selling, but he had an acquaintanceship among members of the Pennsylvania Millers

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[2] Petitioner, a New York corporation, is the successor by merger in 1949 of Taggart Corporation, a Maryland corporation, into petitioner. In 1938 Taggart Brothers, Inc., formerly a New York corporation, was dissolved and its business, properties and assets transferred to Taggart Corporation.

Association. Carey, on the other hand, was an experienced salesman, then in the employ of the Company, and wanted the benefit of Stuart's contacts. For approximately two years they worked together as a team. Stuart testified that he regarded Carey as "a joint member of this contract" (R. 90).

Between 1935 and 1937 both Stuart and Carey expressed to Plunkett their dissatisfaction with the agreement because together they could not sell the annual quota of flour and potato bags. Mr. Plunkett testified that in March, 1937, he called Stuart and Carey together and because of their dissatisfaction with the amount of salaries and non-receipt of commissions he "terminated the arrangement" and increased their salaries (R. 204, 207).

In March, 1937, Stuart's monthly salary was increased from the 1935 rate of $175 to $217, or an increase of $500 per year. Further salary increases were made so that in the final year of Stuart's employment his monthly salary rate was $475 or $5,700 annually.

After March 1937, Carey and Stuart ceased to work together and were assigned to different territories and different kinds of work. In 1943 Stuart moved to Springfield, Massachusetts. Beginning in 1937 he made trips to Maine with exhibits of potato bags and he assisted the local salesmen of a potato bag jobber in Maine. Beginning in 1941 he received a bonus from such jobber on every carload of bags sold.

During the 14 years of Stuart's employment he never made any claim for commission and none was ever paid. He never mentioned the 1935 commission agreement to any responsible officer of petitioner until nearly two years after he was notified of the termination of his employment. Then he wrote a letter of March 13, 1951, to petitioner's president in which he mentioned the 1935 agreement and complained that he was "unfairly treated

by being dropped from St. Regis payroll" (Exhibit 8, R. 66).

At the conclusion of the trial the District Court submitted the following questions to the jury for answers or special verdicts:

> "Did Taggart Brothers Company, Inc., on July 5, 1935, make a commission contract (Exhibit 1) with Stuart and Carey (a) severally or (b) jointly or (c) with no one?" (R. 223)
>
> "Was it altered, formally, or informally at any time so that Stuart, explicitly or impliedly agreed to be paid thereafter on a basis of salary and expenses without commissions?" (R. 224)
>
> "What are the damages which are recoverable by Stuart, the plaintiff?" (R. 225)

The jury answered the three questions as follows: (1) "(a)", the commission agreement was "several"; (2) "No", it was enforceable and not abandoned and (3) "$38,190.75 principal" (for the three year period January 1, 1946 to December 31, 1948) and "$7,890.98 interest", thereby fixing respondent's share of commission and interest thereon for such period at $46,081.83.

After the return of the special verdicts the trial judge denied petitioner's motions (a) to dismiss for lack of joinder of Carey, an indispensable party; (b) to set aside the special verdicts, or, in the alternative, for a new trial, and (3) for a judgment notwithstanding the verdict.

Judgment was entered for respondent Stuart in the sum of $44,082.59. Petitioner appealed to the Court of Appeals for the First Circuit. The Court of Appeals affirmed.

Basis for Federal Jurisdiction in the District Court

The jurisdiction of the District Court rested upon the diversity of the citizenship of the parties and the matter in controversy exceeded, exclusive of interest and costs, $3,000 (28 U.S.C.A. §1332).

Reasons Relied on for the Allowance of the Writ

1. The decision of the Court of Appeals on the question of the respective functions of the judge and the jury in the trial of a civil action where jurisdiction rests on the diversity of citizenship is in conflict with the decisions of this Court in *Goddard* v. *Foster,* 84 U. S. 123; *Hughes* v. *Dundee Mortgage Co.,* 140 U. S. 98, 104; *Hamilton* v. *Liverpool Ins. Co.,* 136 U. S. 242, 255; and in conflict with the decisions by Courts of Appeals in other circuits in *Brown-Crummer Inv. Co.* v. *Koss Cons. Co.,* 4 F. 2d 682 (8th Cir. 1925); *Hurin* v. *Electric Vacuum Cleaner Co.,* 298 Fed. 76 (6th Cir. 1924) and an earlier decision of the Court below in *General Motors Corporation* v. *Abell,* 292 Fed. 922 (1st Cir. 1923), cert. den. 264 U. S. 583.

In the decision below, the Court of Appeals approved the submission by the District Court to the jury of three questions of law involving the interpretation of the written commission agreement:

(1) whether the agreement was joint or several;

(2) whether, if several, the agreement was enforceable, and

(3) if several and enforceable, how commissions were to be computed and divided between the two salesmen who were parties to the agreement.

As a matter of federal law, each of such issues was a question of law for the Court. Rule 49(a) of the Federal Rules of Civil Procedure expressly provides that the court may require special verdicts "upon each issue of fact". Here the three issues were questions of law because the agreement was clear and unambiguous on its face and therefore should have been determined by the court itself without resort to extrinsic evidence.

In *Hughes* v. *Dundee Mortgage Co., supra,* this Court, by Mr. Justice Gray, said (at p. 104):

> "The scope and effect of the contract in question depended wholly upon written correspondence, and in no degree upon extrinsic circumstances, and were, therefore, to be determined by the court. [Citing *Goddard* v. *Foster, supra,* and *Hamilton* v. *Liverpool Ins. Co., supra.*]"

Even assuming *arguendo* that the agreement was ambiguous on its face, there was no disputed extrinsic evidence to aid in the interpretation of the agreement.

In *General Motors Corp.* v. *Abell, supra,* quoting Williston on Contracts, the Court of Appeals, First Circuit, said (at p. 926):

> "If such uncertainty or ambiguity as there may be in a writing does not arise from, and cannot be solved by, any special local meaning of the words used, or any usage or surrounding circumstances, the court will deal with the matter itself, as the difficulty of construction must be solved from the writing alone. * * *"

The decisions of other Circuits are in accord: *Brown-Crummer Inv. Co.* v. *Koss Cons. Co., supra;* cf. *Hurin* v. *Electric Vacuum Cleaner Co., supra.*

As to the issue whether the agreement was joint or several, question (1) above, the only extrinsic evidence at the trial related to the circumstances surrounding the

execution of the agreement and the manner in which Carey and Stuart worked together thereunder for a period of approximately two years. None of this evidence was disputed by either party, and there was thus no issue of fact presented by such evidence.

As to questions (2) and (3), involving the enforceability of the commission agreement as a several obligation, there was no evidence whatsoever before the jury to aid in the interpretation of the agreement. The jury was given the problem of interpretation with no aid other than the agreement itself, the terms of which were never in dispute.

The Court of Appeals below, in approving the submission to the jury of questions of construction which could only be solved from the writing alone or which could only be solved from the writing and undisputed facts, sanctioned a clear departure from the well established rule of federal and general law.

In the opinion of the Circuit Court below it was said (at p. 31, *infra*):

> "It is true that the contract itself does not provide any formula for a division of commissions between Carey and Stuart. It is also true that the conduct of the parties under the contract sheds no light by showing a practical construction of its terms in this respect, for no commissions were ever paid to either salesman."

However, the Court held that the submission to the jury was justified, saying (at pp. 31, 32, *infra*):

> "* * * the plaintiff submitted a logical, reasonable and practical formula by which commissions might be apportioned between the two by putting in evidence the gross sales subject to commissions made by both salesmen, and then suggesting a

> division of the excess of sales above the minimum essentially on the basis of the ratio for each salesman's sales in excess of each one's share of the quota. And the court submitted this method of apportioning commissions to the jury as one, but not necessarily the only, method for calculating the plaintiff's damages if the jury should reach that question."

Whether the "logical, reasonable and practical formula" adopted by the jury (which, as conceded by the Court, was not the only possible formula) was the one intended by the parties is, in the conceded absence of any extrinsic evidence of the parties' intent, a question of law for the court to determine from the words used in the written agreement. Obviously, evidence of the volume of bag sales for the years 1946-1949, as claimed by respondent's witness Chisholm, ten years after execution of the agreement, could not aid in ascertaining the intent of the parties in 1935, when the agreement was made.

The net effect of the decision of the Court of Appeals below may be stated, plainly and simply, as meaning this: Where an unambiguous written agreement containing no words which would require resort to evidence of local custom or other circumstances for its proper construction and interpretation, and where no extrinsic evidence bearing on the construction and interpretation of the agreement has been received, the trial judge may submit to the jury alternative possible constructions of the agreement, thereby permitting the jury to decide issues which heretofore have always been held to be issues of law to be decided by the court.

Here the jury, sitting in Massachusetts, made determinations of issues involving the application of the law of New York (where the agreement was made and commis-

sions would be payable) relating to the construction of a written promise addressed to two individuals, with no instructions from the trial judge regarding the New York law. The jury concluded that the rights of two individuals were "several" and not "joint".

Furthermore, as a "several" obligation the jury held the agreement was sufficiently definite to be enforceable. Thereupon the jury proceeded to determine the method of allocating bag sales between the two individuals, even rejecting the formula for allocating bag sales as proposed by respondent's counsel which would have allocated to each of the individuals a minimum annual quantity of 3,750,000 flour and potato bags before commissions accrued (one-half of the 7,500,000 minimum quota specified in the written agreement), and based its verdict on a minimum quota of only 2,500,000 potato bags and no flour bags, all of which was contrary to the express provisions of the written agreement.

The Court below attempted to justify the submission to the jury of the issue whether the commission agreement was a joint or a several obligation on the following reasoning (Opinion, p. 32, *infra*):

> "Reverting to the contract, we think it must have been contemplated by all concerned that Stuart and Carey would work together as a team, as they usually but not always did at first, at least until Stuart learned salesmanship and Carey became acquainted with Stuart's prospective customers in Pennsylvania. But the jury could reasonably infer that such a peculiar arrangement for salesmen was meant to be only temporary, and, since the contract had no definitely specified time limits but was to be on a yearly basis, infer that the parties probably intended the cooperative arrangement to last only until the purposes it was meant to serve

> were accomplished, after which the salesmen were to operate under the contract independently of each other, as they actually did. It is true that Plunkett testified that the commission feature of the contract was eliminated in 1937, but of course the jury was not required to accept his testimony as true. In spite of Plunkett's testimony, the inference outlined above is enough to take the question of joint or several obligation to pay commissions to the jury."

All of the jury's inferences, however, would have to be drawn from the facts as proved at the trial.

There was no evidence that the team arrangement for the employment of Carey and Stuart was "peculiar" for flour and potato bag salesmen, or that the agreement was "only temporary", or that it was to serve some "purpose" other than the employment of Stuart and Carey on a commission basis for an indefinite period, subject to termination on thirty days' notice by either party, as provided in the written agreement. There were, therefore, no facts before the jury on which the jury could have drawn the inference that it was "peculiar" or "temporary" or to "accomplish any purpose" other than stated in the writing as signed by the parties. Yet those inferences were the only justification in the Court of Appeals opinion for submitting to the jury the issue of law involving the construction of the written agreement.

Upon a consideration of the full record, we respectfully submit that long established rules of federal law fixing the respective functions of the trial judge and of the jury as laid down in the decisions of this Court and of the Courts of Appeals in the First and other Circuits were disregarded by the District Court and the Court of Appeals below.

2. The Court of Appeals failed to apply correctly the Massachusetts conflict of laws rule in accordance with the doctrine stated by this Court in *Erie R. Co.* v. *Tompkins, supra* and *Klaxon* v. *Stentor Elec. Mfg. Co., supra.*

The Court of Appeals properly held that Massachusetts conflict of laws rule required a reference to the law of New York, the place where the agreement was entered into and where the commissions would have been payable, as the substantive law governing the construction of the written agreement. The Court below said (Opinion, p. 29, *infra*):

> "It is the law of New York, and the general rule of the Common Law, that when two or more persons undertake a contractual obligation there arises a presumption of law that they undertake jointly and that words of severance are necessary to overcome this primary presumption."

The foregoing was a correct statement of New York law and is the law that should have been applied here.

However, the Court erroneously stated the New York law in further holding (at pp. 29, 30, *infra*):

> "But no similar presumption arises when a promise is made to several persons for then 'the intention of the promisor as expressed in the contract determines whether the right thereby created is joint or whether rights are created which are several or are joint and several.' Am. Law Inst., Restatement, Contracts §128; 2 Williston on Contracts (Rev. Ed.) §325; *Emmuleth* v. *Home Benefit Assoc.*, 122 N. Y. 130 (1890). Consequently we approach the question whether the obligation to pay commissions was joint or several without indulging in any presumption one way or the other, and so approached we think it clear that the defendant's contention that the obligation was joint as a matter of law cannot be adopted."

The Court did not attempt to determine the intent of the parties from the agreement itself; and, in any event, the foregoing statement regarding the absence of a presumption that the agreement is joint under the New York law is not supported by the decisions of the courts of New York. The *Emmuleth* case, on which the Court relied, involved an insurance policy payable to a group "share and share alike". The New York Court of Appeals held, 122 N. Y. 130, at page 134:

> "The words 'share and share alike' are words of severance and create a several right."

The Court below also overlooked other decisions of the New York courts, which hold that the presumption that a contractual obligation is joint arises both where the promises are made *to* or are made *by* two or more persons and that in either of such situations words of severance are necessary to overcome the presumption (*Rosenzweig* v. *McCaffrey,* 28 Misc. 485; *Brandenburger & Marx* v. *Heimberg,* 34 N. Y. S. 2d 935; *Booth Brothers* v. *Baird,* 83 App. Div. 495 (N. Y. Sup. Ct., 1st Dept., 1903)).

In the *Rosenzweig* case it was held that a promise made *to* two real estate brokers was joint, saying at page 486:

> "The nature and form of a contract generally determines whether the liabilities of the parties are joint, or several, or joint and several. Where a contract is made by two or more persons jointly, and there are no words which indicate a several liability, the contract is a joint one."

Similarly in the *Brandenburger* case, where a promise was made *to* two persons, it was held to be a joint obligation, the court citing with approval 1 Parsons on Contracts, 8th Edition, saying at page 937:

> " 'Wherever an obligation is undertaken by two or more or a right given to two or more, it is the general presumption of Law that it is a joint obligation or right. Words of expressed joinder are not necessary for this purpose; but on the other hand there should be words of severance, in order to produce a several responsibility or a several right', * * * 'As a contract with several persons for the payment to them of a sum of money is a joint contract with all and all the payees have therein a joint interest; so that no one can sue alone for his proportion.' "

Under the Massachusetts conflict of laws rule, the Massachusetts court would have considered all of the foregoing decisions of the New York courts in determining the applicable New York law in the construction of the written agreement (*Dadmun* v. *Dadmun,* 279 Mass. 217).

It is therefore clear that in failing to apply correctly the Massachusetts rule of conflict of laws, the Court of Appeals below did not follow the doctrine established by this Court in *Erie R. Co.* v. *Tompkins, supra* and *Klaxon* v. *Stentor Elec. Mfg. Co., supra.*

3. The approval by the Court of Appeals of the trial court's submission to the jury of the question of abandonment of the commission agreement by the parties is in direct conflict with the decisions of this Court in *Pennsylvania R. R. Co.* v. *Chamberlain,* 288 U. S. 333, and *Gunning* v. *Cooley,* 281 U. S. 90, and also in conflict with the decisions of the Courts of Appeals in other Circuits in *Ryan Distributing Corp.* v. *Caley,* 147 F. 2d 138 (3rd Cir.), *Hill* v. *Baltimore and O. R. Co.,* 153 F. 2d 91 (7th Cir.) and *Floyd* v. *Ring Const. Corp.,* 165 F. 2d 125 (8th Cir.).

In the evidence before the District Court there were no controverted facts on the issue of abandonment. Moreover, there were no inferences favorable to the respondent which could reasonably be drawn from the evidence.

The Court of Appeals in its opinion (at pp. 26, 27, *infra*) referred to the following undisputed facts:

The team arrangement "did not work out to the satisfaction of anyone and came to an end in March, 1937, following a conference between Plunkett, Carey and Stuart in New York." Carey and Stuart frequently expressed dissatisfaction with their agreement and their failure to earn commission thereunder. After 1937 Carey and Stuart worked separately. Subsequently, Carey spent much of his time selling bags other than potato and flour bags. Stuart's salary was increased from time to time until in 1947 he was earning $475 a month instead of the $175 a month provided by the 1935 agreement.

Stuart was "never paid any commissions and he never asked for or received any full accounting of the deliveries made on the orders he booked, although he testified that he thought that he might be able to claim commissions under his letter of contract for every year since 1943 and was reasonably sure he could do so for every year after 1946" (Opinion, p. 27, *infra*). Stuart made his first demand for commissions in March, 1951.

The respondent's first demand for commission was not made until sixteen years after the date of the agreement, ten years after the last time, according to Stuart's testimony, any company representative or officer made any reference to commissions and one year and seven months after his discharge. Every provision of the agreement, except that relating to commissions, according to the opinion of the Court of Appeals, had "admittedly been departed from or abandoned many years before" (Opinion, p. 28, *infra*).

The trial judge after hearing the greater part of respondent's direct testimony stated to respondent's counsel (R. 65):

> "The Court: Do you really seriously contend he [respondent] thought he was subject to those particular terms and didn't insist on those terms over a long period of time? Hadn't he abandoned that method of compensation and agreed to be paid on some other basis? * * *
>
> I agree it is a question of fact but it is a most extraordinary thing for a man to be content over a period of a dozen years being paid on one basis and suddenly say that he is entitled to have been paid on another basis which he never insisted upon during a dozen years. It is up to the jury."

Although the trial judge considered the respondent's prolonged delay in demanding his commission to be "most extraordinary" he nevertheless permitted the question of abandonment to go to the jury. This action by the trial court and its affirmance by the Court of Appeals, as we have pointed out above, was in conflict with the decisions of this Court and decisions of the Courts of Appeals to the effect that the scintilla rule does not apply in federal courts.

In *Gunning* v. *Cooley, supra,* at page 94, this Court said:

> "Where the evidence upon any issue is all on one side or so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury. *People's Savings Bank* v. *Bates,* 120 U. S. 556, 562. *Southern Pacific Company* v. *Pool,* 160 U. S. 438, 440."

That long established doctrine of federal law was not applied below.

The actions by the trial judge and the Court of Appeals also conflict with the decision in *Portman* v. *American Home Products Corp.,* 98 F. Supp. 494 (S. D. N. Y. 1951),

aff'd. 201 F. 2d 847 (2nd Cir., 1953), where, although the evidence of abandonment was less strong than in the instant case, the court set aside the jury's verdict for plaintiff. There the plaintiff's delay in making a claim on an agreement was only three years. In the district court's opinion, it was said (at p. 499):

> "Plaintiff's long delay in asserting a claim against defendant is strong evidence that he had no reasonable expectation of being paid for his services. *Riddlesbarger* v. *Hartford Insurance Co.*, 1868, 7 Wall. 386, 74 U. S. 386, 390, * * *."

In the case at bar, the reasons advanced by the Court of Appeals for approval of the submission to the jury of the issue of abandonment find no foundation in the evidence. The Court said (Opinion p. 33, *infra*):

> "But, on the evidence, the jury could find that Stuart did not press his claim until 1951 because (a) up to the time of his discharge in 1949 he was afraid he would lose his job and pension privileges, (b) he was not sure in 1947 that he had met and received his quota, and (c) he could not find his copy of the letter contract until 1951 and thought he had to have it to press his claim successfully."

As to each of the foregoing possible findings, it is to be noted that they relate to a mental attitude, belief or fear on the part of respondent. There was no evidence of any overt act on the part of respondent inconsistent with abandonment of the commission agreement which, of course, is the only evidence on which a court or jury may act (*Hotchkiss* v. *National City Bank of New York*, 200 Fed. 287, affd. 231 U. S. 50; *Porter* v. *Commercial Cas. Ins. Co.*, 292 N. Y. 176, rearg. den'd. 292 N. Y. 717; *O'Donnell* v. *Clinton*, 145 Mass. 461).

On all of the evidence, we respectfully submit the conclusion is inescapable that there was abandonment of the agreement by the parties and that the trial court should have directed a verdict of dismissal on that ground alone.

4. It will be found upon an examination of the full record of the trial that not only in the disposition of petitioner's motion to dismiss this action for failure to join Carey as an indispensable party under Rule 19(a) of the Federal Rules of Civil Procedure (made prior to the trial and renewed at the trial), but also in the disposition of issues of law relating to the construction and interpretation of the written agreement the trial court permitted issues that were plainly questions of law to be converted into issues of fact. (See for examples of such transformation R. 117, 138, 179, 182, 222, 223, 224, 230, 233, 234, 235.)

The trial judge's rulings and conduct of the trial clearly demonstrate that the trial judge did not discharge that degree of responsibility imposed upon a trial judge as stated by the late Chief Justice Hughes in an unanimous decision of this Court in *Herron* v. *Southern Pacific Co.*, 283 U. S. 91, as follows:

> "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. This discharge of the judicial function as at common law is an essential factor in the process for which the Federal Constitution provides. As was said by Mr. Justice Story, in *United States* v. *Battiste,* 2 Sumner, 240, 243; 'It is the duty of the Court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the Court.' "

In the opinion of the Court of Appeals, the attempt is made to justify the procedure in the trial court by stating possible inferences to be drawn by the jury from facts not proven. In addition, there are included in the opinion of the Court of Appeals matters not in evidence. For example, the opinion states (at p. 30, *infra*) that the agreement "was not drawn by a person versed in the law". There was no evidence of that fact at the trial. Notwithstanding this, however, the Court of Appeals said (at p. 30, *infra*):

> "Under these circumstances, it would be vain to look sharply for legal niceties lurking in the words used, or to draw fine legal distinctions from the omission of words which might have been used."

The Court's opinion suggests different judicial tests in construing agreements drawn by lawyers and laymen's agreements. This, we respectfully submit, introduces a novel rule of law in the federal courts.

The opinion further states (at p. 27, *infra*) that respondent was discharged "two years before he was due for retirement", and again (at p. 33) makes reference to Stuart's loss of "pension privileges". There was no evidence at the trial regarding any retirement or pension rights of Stuart.

The Court of Appeals erroneously stated in its opinion (at p. 34) that "the contract does not provide with absolute clarity that both flour and potato bags in the amounts specified for each must be sold annually before any commissions are due".

The agreement in this respect reads as follows:

> "* * * you [Carey and Stuart] estimate you will return to us sales of 5,000,000 Flour Bags *and* 2,500,000 Potato Bags—per annum. In the event

> *such sales* of Flour *and* Potato Bags are made, and delivered, it is agreed all sales of Flour and Potato Bags, *in excess of the 7,500,000 referred to,* added compensation, in the form of commission, will be allowed thereon—*for such excess sales* * * *" (emphasis supplied).

The improper reference to matters not in the evidence and the departures by the District Court and by the Court of Appeals below from the long established course of judicial proceedings and the sanction thereof by the Court of Appeals, we respectfully submit, call for the exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of the Court

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 4803.

ST. REGIS PAPER COMPANY,
DEFENDANT, APPELLANT,

v.

GEORGE A. STUART,
PLAINTIFF, APPELLEE.

No. 4804.

GEORGE A. STUART,
PLAINTIFF, APPELLANT,

v.

ST. REGIS PAPER COMPANY,
DEFENDANT, APPELLEE.

CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before MAGRUDER, *Chief Judge,* and WOODBURY and HARTIGAN, *Circuit Judges.*

Bailey Aldrich [appearance later withdrawn], with whom *Horace R. Lamb, Choate, Hall & Stewart* and *LeBoeuf, Lamb & Leiby* were on brief, for St. Regis Paper Company.

James D. St. Clair, with whom *Hale and Dorr* was on brief, for George A. Stuart.

OPINION OF THE COURT

July 26, 1954.

WOODBURY, *Circuit Judge.* These are cross-appeals from a judgment entered on the verdict of a jury for the plaintiff in an action by a salesman to recover commissions

under a letter contract reproduced in full in the margin.[1]

---

[1]TAGGART BROTHERS COMPANY, INC.
60 East 42nd Street
New York

July 5th, 1935

Mr. A. B. Carey,
Mr. Geo. A. Stuart.

Gentlemen:-

This will confirm our conversation today—at which time you gentlemen agreed to sell Flour and Potato Bags on the following basis:

We to pay each of you salary of $175.00 per month.

In addition—we are to pay an allowance of 6 cents per mile when cars are used for making sales; also traveling expenses in connection with sales—all of which (cars and traveling expenses) are estimated at approximately $2,000 per annum—per man.

In consideration of the above you estimate you will return to us sales of 5,000,000 Flour Bags and 2,500,000 Potato Bags—per annum. In the event such sales of Flour and Potato Bags are made, and delivered, it is agreed all sales of Flour and Potato Bags, in excess of the 7,500,000 referred to, added compensation, in the form of commission, will be allowed thereon—for such excess sales—at the following rates:—

⅛'s	$1.70M
1/16's	1.15 "
6's	.70 "
3's	.70 "
2's	.50 "
Potato Bags	$1.00M

It is agreed you will also be agreeable, in the course of your travels, to soliciting such Miscellaneous Bag sales as we may designate—it being understood no commissions shall be paid for, or on, such Miscellaneous sales.

It is further agreed your territory for above sales will embrace Pennsylvania, Delaware, Maryland and District of Columbia [in ink, New Jersey ATP]—and Maine only for Potato Bags. It is understood such Flour and Miscellaneous accounts as are now reserved for other salesmen—shall continue on present basis until otherwise changed.

With respect to Mr. George A. Stuart—it is understood this arrangement is to become effective Monday, January 8th 1935.

It is agreed this arrangement is to be on a yearly basis—either of the signing parties reserving the right to cancel upon reasonable and sufficient basis with, in any event, not less than thirty days (30 days) notification.

Very truly yours,
TAGGART BROTHERS COMPANY INC.
(signed) A. T. PLUNKETT
Vice President

(signed) ALBERT B. CAREY
(signed) GEO. A. STUART

Appendix

The plaintiff, George A. Stuart, was graduated from the University of Maine in 1910 and for the next 25 years he worked in various agricultural capacities, at first for the United States and later for the Commonwealth of Pennsylvania, where he eventually became the Director of the Bureau of Markets. In 1935 he lost that position due to a change of administration. Up to that time he had no experience in selling. He had, however, done research in the field of paper manufacturing, and he had been active in developing and encouraging the use in Pennsylvania of paper bags for the packaging of flour and potatoes. In the course of these latter activities he developed a large acquaintance among Pennsylvania millers (indeed he was elected in effect the secretary of the Pennsylvania Millers Association although his wife held the title) and others in the business of producing and marketing foods, and allied occupations. Included in the latter group was the Albert B. Carey mentioned in the letter contract, who was a paper bag salesman for Taggart Brothers Company, Inc., now dissolved, a former subsidiary of Taggart Corporation, which before suit merged with the defendant, St. Regis Paper Company.[2]

Carey, believing that Stuart might be of assistance in selling paper bags, approached the latter at about the time he lost his position, and finding Stuart interested, took up the matter of his employment by Taggart Brothers Company, Inc., with A. T. Plunkett, then vice-president of the company. After one or two preliminary discussions, all three met in the company's office in New York City and the

[2] Taggart Corporation was not served and did not appear. St. Regis Paper Company has agreed for present purposes to pay any judgment that may be rendered against either defendant.

letter agreement reproduced above, which had already been prepared, was signed on the day of its date.[3]

Thereafter Carey and Stuart for the most part, although not invariably, traveled and worked together, Carey teaching Stuart salesmanship and Stuart introducing Carey to prospective customers among his friends and acquaintances in Pennsylvania. This arrangement, however, did not work out to the satisfaction of anyone and it came to an end in March, 1937, following a conference between Plunkett, Carey and Stuart in New York. There is a dispute as to what was said at that meeting. Plunkett testified that he told Carey and Stuart that they had frequently expressed dissatisfaction with their salaries and with their failure to earn any commissions, and that in consequence he terminated the previous arrangement altogether and raised their salaries $500 per year apiece. Stuart agreed that he had expressed dissatisfaction with his salary and his failure to earn commissions, and admitted that his salary was raised $500 per year, but he denied that the letter agreement was terminated so far as commissions were concerned. At any rate, after March, 1937, Carey and Stuart worked separately and thereafter saw each other infrequently, usually only at company sales meetings. From 1937 on, Stuart concentrated on selling potato bags in Maine, and in 1943 moved to Springfield, Massachusetts, where he has since resided, in order to be nearer his field of activity. Carey never went to Maine but continued to sell flour and potato bags in Pennsylvania, later spending much of his time selling

[3] There is, apparently, a typographical error in the letter, for the date Stuart was to begin work, and did begin work, was July 8, 1935, not January 8, 1935.

cement and other multi-wall bags of types not covered by the agreement.

Over the years following 1937, Stuart's salary was increased from time to time until in 1948 he was receiving $475 per month. He was never paid any commissions and he never asked for or received any full accounting of the deliveries made on the orders he booked, although he testified that he thought he might be able to claim commissions under his letter contract for every year since 1943 and was reasonably sure he could do so for every year after 1946. He was discharged at the age of 63 in July, 1949, two years before he was due for retirement. He made his first demand on the defendant for commissions in March, 1951, and he brought the instant action in October of that year in the Superior Court of the Commonwealth of Massachusetts from which it was removed to the court below, there being the requisite diversity of citizenship and amount in controversy for federal jurisdiction under Title 28 U.S.C. §1332(a)(1).

Upon removal the defendant moved to dismiss the action for failure to join an indispensable party, to wit, Carey. The District Court denied the motion without prejudice and the case went to trial by jury. During the trial the defendant protected its rights by motions for a directed verdict, which were denied, and after verdict for the plaintiff, for judgment notwithstanding the verdict and in the alternative for a new trial, which was also denied.

The District Court, in denying the defendant's motion to dismiss for failure to join Carey as an indispensable party, by necessary implication ruled that the letter agreement might legally be construed to constitute an obligation to pay commissions to Stuart and Carey severally,

and that so construed the extent of the defendant's obligation to Stuart alone was capable of rational ascertainment. By denying the defendant's subsequent motions for judgment, and for judgment notwithstanding the verdict, the court repeated the above rulings, and ruled in addition, first, that there was substantial evidence to permit findings by the jury in accordance therewith, and second, that on the evidence the jury could in reason find that the agreement as to commissions remained in full force and effect in spite of the fact that its other specific provisions had admittedly been departed from or abandoned many years before. In accordance with its rulings the court submitted the following three specific questions to the jury. It asked, first, whether the agreement so far as commissions were concerned was made with Stuart and Carey (a) severally, (b) jointly, or (c) with no one; second, if question one were answered either (a) or (b), (the jury answered it (a)), whether, if a commission contract had originally been made, it was later at any time, formally or informally, altered so that thereafter Stuart either explicitly or impliedly agreed to be paid on the basis of a salary and expenses without commissions (*i.e.*, whether there had occurred a termination, abandonment or rescission of the commission feature of the agreement,) which the jury answered "No", and, third, the extent of damages, which the jury answered by giving the plaintiff $38,190.75 principal and $7,890.98 interest, or a total of $46,081.73.

The preceding brief statement of the case provides enough background for consideration of the defendant-appellant's basic contentions on its appeal. These are, (1) that on its face the letter agreement was unambiguously

joint as to the obligation to pay commissions, (2) that unless the agreement is so interpreted it is too indefinite to be enforceable, (3) that since Stuart and Carey had, or have, a joint interest in any commissions which might be payable under the contract, Stuart's action must be dismissed under Rule 19(a) F.R.C.P. for failure to join Carey as an indispensable party plaintiff, and (4) that on the record the conduct of the parties was such as to work a termination or abandonment of the entire agreement as a matter of law.

The first three contentions hinge on the question whether the jury could properly find that the defendant's obligation to pay commissions under the agreement ran to the obligees jointly, or ran to each one of them severally. And this question is to be determined under the law of New York for that is the jurisdiction to which the Massachusetts courts would refer because the contract was made in New York and its performance was not contemplated in any other particular jurisdiction but in several eastern states from Maryland to Maine. See *Autographic Register Co.* v. *Philip Hano Co.*, 198 F. 2d 208, 212 (C.A. 1, 1952); *Wetherell Bros. Co.* v. *United States Steel Co.*, 200 F.2d 761, 763 (C.A. 1, 1952) and the Massachusetts cases cited therein.

It is the law of New York, and the general rule of the Common Law, that when two or more persons undertake a contractual obligation there arises a presumption of law that they undertake jointly and that words of severance are necessary to overcome this primary presumption. *U.S. Printing & Lithographing Co.* v. *Powers*, 233 N.Y. 143 (1922); 2 Williston on Contracts (Rev. Ed.) §322; Am. Law Inst., Restatement, Contracts §112. But

no similar presumption arises when a promise is made to several persons for then "the intention of the promisor as expressed in the contract determines whether the right thereby created is joint or whether rights are created which are several or are joint and several." Am. Law Inst., Restatement, Contracts §128; 2 Williston on Contracts (Rev. Ed.) §325; *Emmuleth* v. *Home Benefit Assoc.*, 122 N.Y. 130 (1890). Consequently we approach the question whether the obligation to pay commissions was joint or several without indulging in any presumption one way or the other, and so approached we think it clear that the defendant's contention that the obligation was joint as a matter of law cannot be adopted.

The agreement was arrived at by laymen, and it is obvious that the letter contract embodying the agreement was not drawn by a person versed in the law. Doubtless no one of the contracting parties had the slightest inkling of the legal problems to arise in the course of time out of what must have seemed to them a normal and mutually advantageous business arrangement couched in practical every-day language. Under these circumstances it would be vain to look sharply for legal niceties lurking in the words used, or to draw fine legal distinctions from the omission of words which might have been used. Instead of attempting close analysis of the language we must try to ascertain the meaning of the parties from the words they used, and from whatever other admissible evidence of their meaning there may be, and, if their intention is reasonably ascertainable, enforce their agreement since there is nothing about it contrary to public policy. Approached in this way, we think the court below properly submitted the question of the contracting parties'

meaning with respect to the payment of commissions to the jury, and that the jury's answer to that question cannot be successfully challenged by the loser, the St. Regis Paper Company.

Certainly the obligor's promise to pay salaries to Carey and Stuart was several. It is clearly so expressed in the contract. And so also, although not so clearly expressed, was the promise to pay traveling and other expenses. It can hardly be reasonably supposed that it was not intended to reimburse each salesman his own expenses incurred in making sales.

There are no clear words of severability in the promise to pay commissions. But, considering the circumstances surrounding the drafting of the contract alluded to above, we do not think this omission particularly significant. Nor is there any strong inference of severability with respect to the promise to pay commissions as there is with respect to the promise to pay expenses. On the other hand, however, we cannot infer a joint obligation to pay commissions from the unenforceability of the contract for indefiniteness unless it is so construed, as the defendant-appellant argues, for we do not find the contract too vague to be enforced when it is construed as a several obligation so far as commissions are concerned. It is true that the contract itself does not provide any formula for a division of commissions between Carey and Stuart. It is also true that the conduct of the parties under the contract sheds no light by showing a practical construction of its terms in this respect, for no commissions were ever paid to either salesman. But the plaintiff submitted a logical, reasonable and practical formula by which commissions might be apportioned between the two by

putting in evidence the gross sales subject to commissions made by both salesmen, and then suggesting a division of the excess of sales above the minimum essentially on the basis of the ratio of each salesman's sales in excess of each one's share of the quota. And the court submitted this method of apportioning commissions to the jury as one, but not necessarily the only, method for calculating the plaintiff's damages if the jury should reach that question.

Reverting to the contract, we think it must have been contemplated by all concerned that Stuart and Carey would work together as a team, as they usually but not always did at first, at least until Stuart learned salesmanship and Carey became acquainted with Stuart's prospective customers in Pennsylvania. But the jury could reasonably infer that such a peculiar arrangement for salesmen was meant to be only temporary, and, since the contract had no definitely specified time limit but was to be on a yearly basis, infer that the parties probably intended the cooperative arrangement to last only until the purposes it was meant to serve were accomplished, after which the salesmen were to operate under the contract independently of each other, as they actually did. It is true that Plunkett testified that the commission feature of the contract was eliminated in 1937, but of course the jury was not required to accept his testimony as true. In spite of Plunkett's testimony, the inference outlined above is enough to take the question of joint or several obligation to pay commissions to the jury.

The question of termination or abandonment was also properly submitted to the jury. In addition to what has already been said bearing on that question, it is pertinent

to note that although Plunkett testified that the entire agreement was terminated and abandoned in March, 1937, Stuart testified that as late as 1941 Plunkett told him that he would earn more commissions if he moved to Maine where he could better concentrate on selling potato bags. It is true that Stuart's delay until 1951 in pressing his claim lends support to the conclusion that the entire contract was indeed terminated and abandoned as Plunkett testified. But, on the evidence, the jury could find that Stuart did not press his claim until 1951 because (a) up to the time of his discharge in 1949 he was afraid he would lose his job and pension privileges, (b) he was not sure in 1947 that he had met and exceeded his quota, and (c) he could not find his copy of the letter contract until 1951 and thought he had to have it to press his claim successfully.

The defendant-appellant further contends, in addition to asserting that no damages can be assessed at all because there is no legal way of apportioning commissions, a matter we have already considered, that the evidence does not support the award of damages made by the jury. It says that the only explanation for the jury's verdict of $38,190.75 is that the jury found Stuart not entitled to any commission on flour bags, a matter in dispute, and then took his evidence of total potato bag sales for the years 1946-1949, inclusive, of 48,190,546, deducted the entire separate potato bag quota for the four years of 10,000,000 bags, leaving 38,190,546 bags which at the contract rate of $1.00 per thousand gives the figure $38,190.55. (It attributes the 20-cent discrepancy to a mathematical error made by the jury.) The defendant-appellant says that this verdict cannot stand because in reaching it the

jury must have disregarded the flour bag quota in violation of the court's categorical instruction, to which the plaintiff did not object, that "there is a floor which you must reach before you begin to calculate anything, and that floor is this, you must have a situation in which, with respect to potato bags, two and one-half million are sold in a year through the efforts of Carey and Stuart, *and* five million flour bags are sold through the efforts of Carey and Stuart, before any commissions are payable on the bags." (Italics ours.)

In answer to this contention it is enough to say that the contract does not provide with absolute clarity that both flour *and* potato bags in the amounts specified for each must be sold annually before any commissions are due, and the court told the jury that although it might so find, it could also if it chose adopt the formula testified to by the plaintiff's expert accountant based on sales of potato bags alone which the court described as "that two and a half million potato bags had to be sold in a year by the two of them, and once you found out that two and a half million potato bags were sold, then you would make an allocation of credit on the basis of finding out what each one sold and how much the excess was and attribute the excess in proportion to the several sales of the two individuals." Indeed, it is logical for the jury to have adopted the latter formula in view of its findings that the obligation to pay commissions was several and had not been abandoned, and in view of the clear evidence that the two salesmen soon separated, Stuart concentrating thereafter almost exclusively on selling potato bags alone.

The defendant-appellant's contentions that the District Court twice erred in excluding evidence have upon consideration been found too insubstantial to warrant discussion.

The same may be said of the contention made by plaintiff-appellant on his cross-appeal with respect to the amount of interest awarded by the District Court.

The judgment of the District Court is affirmed without costs in this court to either party.

Appendix

Judgment of the Court of Appeals

July 26, 1954

This cause came on to be heard on the record on cross-appeals from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed without costs in this Court to either party.

By the Court:

/s/ Roger A. Stinchfield,
Clerk.

Appendix

Unreported Opinion of the District Court

MEMORANDUM

October 9, 1953

WYZANSKI, D. J.

In my opinion, there was credible evidence upon which the jury could reasonably have reached the answers it gave in the special verdict. The item of interest, however, was computed in accordance with an erroneous instruction of law, and, therefore, should not be used in determining the judgment. Instead the interest should be in the amount of $5,891.84 (on the principal amount of $38,190.75) which, by stipulation of the parties, represents interest at 6% from March 13, 1951, the date plaintiff first made demand upon defendant, St. Regis Paper Corporation.

Motion for dismissal for want of indispensable party denied.

Motion for directed verdict or judgment denied.

Motion of October 2, 1953 denied.

Judgment, dated October 9, 1953, for plaintiff, in the amount of $44,082.59.

(s) CHARLES E. WYZANSKI, JR.,
United States District Judge.